

Update: Criminal Procedure Monograph 2—Issuance of Search Warrants (Third Edition)

Part A—Commentary

2.8 Probable Cause Determination

C. Anticipatory Probable Cause

Insert the following case summary before subsection (D) on page 18:

Anticipatory search warrants do not violate the Fourth Amendment’s warrant clause. *United States v Grubbs*, 547 US ___, ___ (2006). The United States Supreme Court also held that the condition or event that “triggers” execution of an anticipatory search warrant need not be included in the search warrant itself.

In *Grubbs*, the defendant purchased a child pornography video from an Internet website managed by an undercover postal inspector. A postal inspection officer obtained an anticipatory search warrant conditioned on delivery of the videotape to the defendant’s residence and the defendant’s receipt of the videotape. The affidavit accompanying the warrant application stated in part:

““Execution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken into the residence[.]”” *Grubbs, supra* at ___.

The search warrant given to the defendant at the time it was executed did not include the affidavit or the language used in the affidavit to describe the “triggering” condition. The defendant argued that evidence obtained as a result of the warrant should be suppressed because the warrant was invalid for its failure to specify the condition on which the warrant’s execution was based. The Court disagreed:

“The Fourth Amendment . . . specifies only two matters that must be ‘particularly describ[ed]’ in the warrant: ‘the place to be searched’ and ‘the persons or things to be seized.’ . . . [The Fourth

Amendment's] particularity requirement does not include the conditions precedent to execution of the warrant." *Id.* at ____.

Part A—Commentary

2.14 Other Exceptions Applicable to Search Warrants

F. Consent

Insert the following text after the second paragraph on page 34:

A warrantless search of a shared dwelling conducted pursuant to the consent of one co-occupant when a second co-occupant is present and expressly refuses to consent to the search is unreasonable and invalid as to the co-occupant who refused consent. *Georgia v Randolph*, 547 US ___, ___ (2006).

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2.13 The Exclusionary Rule and Good Faith Exception

Insert the following case summary after the second full paragraph near the middle of page 29:

Even where a search warrant is based in part on tainted evidence obtained as a result of an officer's Fourth Amendment violation—"fruit of the poisonous tree"—the good-faith exception to the exclusionary rule may apply to evidence seized pursuant to the warrant if "an objectively reasonable officer could have believed the seizure valid." *United States v McClain*, 430 F3d 299, 308 (CA 6, 2005), quoting *United States v White*, 890 F2d 1413, 1419 (CA 8, 1989).

In *McClain*, after a nearby resident reported that lights were on at an unoccupied house in the neighborhood, police officers searched the residence without a warrant and without having probable cause to conduct a search of the residence. *McClain, supra* at 302–303. Officers entered the residence through a door that was "slightly ajar" even though the officers "observed no movement in or around the home, no signs of forced entry or vandalism, and no suspicious noises or odors emanating from the house." *Id.* at 305–306. During their warrantless search of the home, the officers discovered evidence that the basement was being readied to house "a marijuana-grow operation." *Id.* at 303. Because no exception to the warrant requirement justified the warrantless search, the defendant argued that any evidence seized during the "execution of search warrants issued on the basis of evidence obtained as a result of that initial warrantless search" should be suppressed. *Id.* at 301.

The district court agreed with the defendant and suppressed the evidence. *McClain, supra* at 301–302. The Sixth Circuit Court of Appeals concluded that the good-faith exception to the exclusionary rule applied to the evidence seized as a result of the "tainted" search warrant and reversed the district court's decision. *Id.* at 302, 307. According to the Sixth Circuit:

“The facts surrounding these officers’ warrantless entry into the house at 123 Imperial Point were not sufficient to establish probable cause to believe a burglary was in progress, but we do not believe that the officers were objectively unreasonable in suspecting that criminal activity was occurring inside [the defendant’s] home, and we find no evidence that the officers knew they were violating the Fourth Amendment by performing a protective sweep of the home. More importantly, the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search, and [the officer’s] warrant affidavit fully disclosed to a neutral and detached magistrate the circumstances surrounding the initial warrantless search. . . . Because the officers who sought and executed the search warrants acted with good faith, and because the facts surrounding the initial warrantless search were close enough to the line of validity to make the executing officers’ belief in the validity of the search warrants objectively reasonable, we conclude that despite the initial Fourth Amendment violation, the [good faith] exception bars application of the exclusionary rule in this case.” *McClain, supra* at 308–309.